QUEK CHING KIM v. REG.

[A. Cr. J. (Whyatt C.J.)· December 7, 1955]

[Singapore — Magistrate's Appeal No. 108 of 1955]

Common Gaming Houses Ordinance (Cap. 30), s. 4(c) — Charge wrongly worded — No offence disclosed in charge.

Criminal Procedure Code, 1955, s. 156(2) — Whether charge can be amended at the appellate stage.

In this case the appellant was charged and convicted on the following charge: "That you on or about the 4th day of January 1955 at 11.40 p.m. at 85 Rowell Road, Singapore, did assist in the management of a public lottery, to wit by being found in possession of 16 chap ji kee slips, and you have thereby committed an offence punishable under s. 4(c) Cap. 30." The appellant appealed against the conviction.

Held: (1) the charge was wrongly worded as it alleged that the appellant had assisted in the management of a lottery whereas the provisions of s. 4(c) of the Common Gaming Houses Ordinance relate only to "assisting" in the conduct of a lottery; (2) the charge as worded did not disclose any offence and therefore the conviction must be set aside.

The intention of s. 156(2) of the Criminal Procedure Code, which provides that any amendment to a charge should be read and explained to the accused, is that such amendments may only be made during the proceedings before a Magistrate.

MAGISTRATE'S APPEAL.

D. G. Osborne-Jones for the appellant.

J. F. McWilliam (Crown Counsel) for the respondent.

Whyatt C.J. : — This appeal was brought for the purpose of challenging the conviction by the learned Magistrate on the ground that the prosecution had failed to prove firstly, an overt act by the accused in furtherance of the offence, as it is suggested in *Braddell's* Commentary on Common Gaming Houses page 89 should be proved in cases of this kind, and secondly, that the chap ji kee slips, (which had no date on them) related to a lottery "then in progress"

These issues were fully argued by Counsel for the appellant and for the Crown but at the conclusion of their arguments the point was raised that the charge was erroneously worded and did not disclose an offence against section 4(c) of the Common Gaming Houses Ordinance. The charge, as framed, alleged that the accused had assisted in the "management" of a lottery whereas the provisions of section 4(c) relate only to "assisting" in the conduct of a lottery.

It was conceded by Counsel for the Crown that the charge as worded did not disclose any offence and that it was necessary for him to apply to amend the charge in order that the conviction might stand.

After an adjournment to allow Counsel on both sides to consider the position further, the hearing of the appeal was resumed and Counsel for the Crown did not seek to press the point that he was entitled to ask the Appellate Court to amend the charge at the appellate stage. In adopting this attitude Counsel for the Crown stated that he was influenced by the fact that sub-section (2) of section 156 of the Criminal Procedure Code provided that any amendment to a charge should be read and explained to the accused, but since on appeal the accused was not necessarily present, it seemed to follow that the intention was that such amendments could only be made during the proceedings before a Magistrate.

I agreed with the view of Counsel for the Crown that the charge as worded did not disclose any offence and it was now too late to amend it so as to bring it within the provisions of section 4(c) of the Common Gaming Houses Ordinance. I accordingly allowed the appeal.

Appeal allowed.

Solicitors for the appellant : *Osborne-Jones & Co.*

Re SOO LEOT

[Cr. R. J. (Buhagiar J.) November 29, 1955]

[K. L. — Criminal Revision No. 24 of 1955]

Criminal Procedure Code (Cap. 6), s. 325 — Revision — Powers of High Court — Accomplice — Whether witness is an accomplice — Hearsay evidence.

In this case Soo Leot was charged with offences punishable under s. 414 and under ss. 465 and 471 of the Penal Code. At the conclusion of the trial the learned Magistrate acquitted and discharged the accused of all charges. On the hearing of the case on revision, counsel for the accused raised a preliminary objection to the revision. He submitted that in cases of acquittal, if the Public Prosecutor has not preferred an appeal, the High Court ought not to interfere.

The learned Magistrate in this case held that a witness was an accomplice as he had assisted the accused in disposing of 3 bicycles. It was clear from the evidence that the witness did not assist the accused in disposing of the bicycles which were the subject of the charges before the Court.

Held: (1) the powers of the High Court in revision are exercisable at the discretion of the Court and that discretion is untrammelled and free, so as to be fairly exercised according to the exigencies of each case; (2) in this case, the learned Magistrate was wrong in holding that the witness was an accomplice and therefore the order of acquittal and discharge must be set aside and a new trial ordered.

Cases referred to:—

(1) *Sherkhan v. Anwarkhan* A.I.R. 1927 Nag. 170.

(2) *Kamikha Pershad v. King-Emperor* A.I.R. 1927 Oudh 345.

(3) *Rai v. Dass* I.L.R. 5 Pat. 25.

(4) *R. v. Lachiram* I.L.R. 28 Bom. 533.

(5) *Tan Yook Suen v. R.* (1954) M.L.J. 166.

(6) *Davies v. Director of Public Prosecutions.* (1954) 1 All E.R. 507; [1954] A.C. 369; [1954] 2 W.L.R. 343: 38 Cr. App. R. 11.

CRIMINAL REVISION.

E. Brown (Federal Counsel) for the Public Prosecutor.

F. C. Arulanandom for the accused.

Buhagiar J. : — Soo Leot was charged in the Kuala Lumpur Magistrates' Court, with offences punishable under section 414 and under sections 465 and 471 of the Penal Code.

At the conclusion of the trial the learned Magistrate found certain facts and was of opinion that the prosecution had not proved their case and therefore acquitted and discharged the accused on all charges.

On examining the record, I was of opinion that the learned Magistrate had misdirected himself on points of law and decided to exercise the powers of revision.

At the hearing of the case on revision, Mr. Arulanandom for the accused raised a preliminary objection to the revision. He submitted that although the powers of the Court are unfettered, they are subject to limitations; he submitted that in cases of acquittal if the Public Prosecutor has not preferred an appeal, the High Court ought not to interfere; it should only exercise the revisional powers in exceptional cases when there has been a denial of the right of fair trial or it is urgently demanded in the interests of public justice. He referred to *Sherkhan v. Anwarkhan*[1]; *Kamikha Pershad v. King-Emperor*[2] and *Rai v. Dass*[3].

No local authorities were quoted and I am not aware than in practice the Courts of this country have laid down any rules which confine the discretion given by law in a manner in which the legislature has not seen fit to confine it. The principles which should guide the Courts in the exercise of the revisionary powers have been clearly set out by Jenkins C.J. in *R. v. Lachiram*[4], where at page 566 he observed :

"If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and whenever it is argued that judicial decision has deprived us of the power that the Legislature has given us, I recall the words of an eminent English Judge : 'I desire to repeat', he said, 'what I have said before, that this controlling power of the Court is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances, which vary greatly. For myself, I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the Legislature has committed to them. This discretion, like all other judicial discretions ought, as far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case'. These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary powers of revision. This may perhaps increase our responsibilities and add to our labours, but no one would shirk the one or grudge the other".

The first point for consideration is whether the learned Magistrate was wrong in holding that P.W. 14 was an accomplice to the offences with which the accused was charged. In his grounds of judgment the learned Magistrate said : "P.W. 14 is an accomplice *Tan Yook Suen v. Regina*[5]. P.W. 14 had assisted accused in disposing of 3 bicycles and later lodged a report at High Street Police Station. Therefore I have to warn myself, although I can convict on his evidence, it is dangerous to do so unless there exists corroborative evidence of such a convincing, cogent and irresistible character." It is clear from the evidence that P.W. 14 did not assist the accused in disposing of the bicycles the subject of the present charges. The question "who is an accomplice" has been fully dealt with by the House of Lords in *Davies v. Director of Public Prosecutions*[6]. The principles laid down in this case may be briefly stated as follows :—

The following persons, if called as witnesses for the prosecution, have been treated as falling within the category of accomplice for the purpose of the rule that a Judge ought to warn juries about the evidence of an accomplice :—

1. On any view, persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is the natural and primary meaning of the term "accomplice". But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions, been held to be accomplices for the purposes of the rule, viz.:

2. Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny:

3. When X has been charged with a specific offence on a particular occasion, and evidence is admissible, and has been admitted, of his having committed crimes of this identical type on other occasions, as proving system and intent and negativing accident; in such cases the court has held that in relation to such other similar offences, if evidence of them were given by parties to them, the evidence of such other parties should not be left to the jury without a warning that it is dangerous to accept it without corroboration.

In the present case P.W. 14 might have been an accomplice within the third category of persons mentioned above if there had been evidence to show that the accused had committed crimes of an identical type on other occasions; but there is no such evidence. In my opinion, therefore, on the evidence before him the learned Magistrate wrongly held that P.W. 14 was an accomplice. Having come to the conclusion that P.W. 14 was an accomplice he was right in warning himself against the danger of convicting on the uncorroborated evidence of that witness; but in my view there was sufficient corroborative evidence connecting the accused with the crime. I may add that it is difficult to understand how the learned Magistrate, having held that P.W. 14 was an accomplice and that his evidence is unworthy of credit and that apart from this there was not a shred of evidence to show that the accused had that guilty knowledge requisite to constitute the charge, held that there was a case to answer and called upon the accused to enter his defence.

Another point for consideration is whether that part of the evidence of the accused where he testified that one Wong Hwa (from whom he said that he had acquired the bicycles) had told him that the three bicycles were bought by him, was hearsay evidence and therefore improperly admitted. Now, as a general rule, statements made by persons not called as witnesses are inadmissible to prove the truth of the facts stated. In the present case the fact that he has told that the bicycles in question were lawfully acquired is admissible evidence of the state of mind of the accused because it is relevant to show that he did not have reason to believe that the bicycles in question were stolen property (section 14 of the Evidence Ordinance, 1950). As stated in 13 *Halsbury's* Laws of England 2nd ed. p. 573, para 645: "A statement is hearsay if tendered to prove the truth of the facts asserted; it is original evidence if its materiality depends on the fact that it was made, and not on the fact that it was true." Wong Hwa was not called as a witness and naturally the weight and value of the evidence given by the accused that Wong Hwa had made such a statement to him is very much reduced.

For the above reasons I held that on the evidence before him the learned Magistrate wrongly held that P.W. 14 was an accomplice and I set aside the order acquitting and discharging the accused and ordered a retrial before another Magistrate.

Re-trial ordered.

Re JOHARI BIN RAMLI

[Cr. R. J. (Spenser Wilkinson J.) November 28, 1955]

[Penang — Criminal Revision No. 43 of 1955]

Criminal trial — Sentence — Recording of previous convictions by Magistrate — Need for care in selecting sentence in case of juvenile delinquents.

In this case the accused who was 21 or 22 years of age was convicted on a charge of possession of house-breaking implements, an offence under s. 28(1)(ii) of the Minor Offences Ordinance, 1955. He had a number of previous convictions but details of these were not recorded by the Magistrate who only noted: "The accused admits several (six) previous convictions for theft, house-breaking, possession of stolen property, etc." The learned Magistrate sentenced the accused to 10 days' imprisonment. On revision the learned Judge called for a Probation Officer's report and after considering the report, he set aside the sentence and substituted an order binding over the accused in the sum of $500 to be of good behaviour and to come up for sentence when called upon and in the meantime to be under the supervision of a Probation Officer.

Semble: where the accused has previous convictions, either a complete list of the previous convictions with full details thereof should be put in and marked as an exhibit or the Magistrate himself should record details of all the convictions showing what the charge was, the date of conviction and the sentence imposed.

CRIMINAL REVISION.

D. C. Jackson (Sr. Federal Counsel) for the Crown.

Accused in person.

Spenser Wilkinson J.: — The accused in this case, who is a young man of 21 or 22, was found in possession of house-breaking implements at about midnight on the 20th October, 1955 and pleaded guilty to a charge under section 28(1)(ii) of the Minor